

RECENT DEVELOPMENTS IN WATER UTILITY LAW

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* The opinions expressed in this outline are solely the author's and do not necessarily reflect those of the Public Service Commission or any other person employed by the Public Service Commission.

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I. INTRODUCTION

II. LEGISLATIVE DEVELOPMENTS

A. 2003 General Session

1. House Bill 296 – Created and amended various sections of KRS Chapters 45A, 56, and 164A to permit the use of “design-build” process for the design and construction of capital projections. Revisions are not included in Local Model Procurement Code (KRS 45A.345 – 45A.460).
2. House Bill 357 – Amended KRS Chapter 74 to enable federal agencies to participate in water commissions that administer joint water operations.
3. Senate Bill 94 – Created a new section of KRS Chapter 522 to address the felony crime of abuse of public trust. “Abuse of public trust” occurs when public officer or employee, who is entrusted with public money or property by reason of his or her office, obtains public money or property subject to a known legal obligation to make specified payment or other disposition and intentional deals with the public money or property as his or her own and fails to make the required payment or disposition. Person convicted of offense is disqualified from holding public office.
4. Senate Bill 127 – Amended KRS 224A.111 to allow the wastewater revolving fund loan to be used for securing the issuance of bonds by the Kentucky Infrastructure Authority (KIA); amended KRS 224A.1115 to allow the water supply revolving fund to be used for securing the issuance of bonds by KIA; and amended KRS 224.165 to delete authorization to issue interim construction financing bonds and bonds having a final maturity greater than 3 years but allow bonds outstanding up to a maximum of \$500,000,000 rather than \$125,000,000.
5. Senate Bill 138 – Amended KRS 278.360 to permit the Public Service Commission to videotape formal proceedings for use as public record; deleted the requirement that a stenographic transcript of all formal proceedings be required; permitted a party before a proceeding to request a stenographic transcript of the proceeding be made available if the request is made prior to the hearing.

B. 2004 General Session

House Bill 202 – Created a new section of KRS Chapter 65 to require any entity that furnishes sewage treatment service to customers of another sewer system by using its installations to pay just compensation; granted the power of eminent domain over sewage treatment facilities; permitted entities to recover costs through surcharge to customers; repealed KRS 65.115.

C. 2005 General Session

1. House Bill 59 – Amended KRS 61.810 to create an Open Meetings Law exception for the discussion of certain homeland security records and amended KRS 61.878 to create an Open Records Law exception for certain homeland security records. These include public records whose disclosure would expose a vulnerability in preventing, protecting against, mitigating, or responding to a terrorist act. Specifically listed were vulnerability assessments, antiterrorism protective measures and plans; security and response need assessments, and public utility critical systems (electrical, water, wastewater, and gas systems).

2. House Bill 264 – Amended KRS 74.260 to delete the prohibition that bids awarded on a lump-sum basis cannot exceed estimated costs except as specified.

3. House Bill 267 (Executive Branch Budget) – Exempts water districts and water associations that are classified as a Class A or B utility, as defined in the Uniform System of Accounts, from the requirement of obtaining a certificate of public convenience and necessity for a waterline extension or improvement project if the project does not cost in excess of \$500,000 or the water district or water association will not, as a result of the project, incur obligations requiring Public Service Commission approval pursuant to KRS 278.300. Water district or water association may not increase rates as a result of the water main extension. Exemption expired 30 June 2006.

D. 2006 General Session

1. House Bill 54 – Created three new sections of KRS Chapter 365, relating to trade practices, to require businesses, when they dispose of customer records not required to be retained, to take reasonable steps to destroy the portions of the records containing personally identifiable information so that the personal information is unreadable or indecipherable; create a civil cause of action for a customer who is injured and can claim damages because of the failure of a business to conform;

and amended KRS 434.870, relating to disclosure of financial information, to expand the definition of "person" to include any type of business entity.

2. House Bill 171 – Amended KRS 424.220 to require annual statement of disbursed funds to list only vendors whose aggregate disbursement exceeded \$1,000. Eliminated requirement that the purpose of the disbursement be listed.

3. House Bill 380 (Executive Branch Budget) – Exempts water districts and water associations that are classified as a Class A or B utility, as defined in the Uniform System of Accounts, from the requirement of obtaining a certificate of public convenience and necessity for a waterline extension or improvement project if the project does not cost in excess of \$500,000 or the water district or water association will not, as a result of the project, incur obligations requiring Public Service Commission approval pursuant to KRS 278.300. Water district or water association may not increase rates as a result of the water main extension. Exemption expires 30 June 2008.

4. Senate Bill 226 – Repealed KRS 74.260 which required the letting of work for water district construction projects.

E. 2007 General Session

1. House Bill 448 – Amends KRS 65.065 to increase to \$750,000 from \$400,000 the amount of annual revenue or expenses required for the performance of an annual audit.

2. House Bill 490 – Kentucky Fairness Construction Act. Amends KRS Chapter 371 to provide certain terms for construction contracts, to include time limits for payment to contractor and subcontractor, permitting a contractor to recover costs resulting from delay of the contracting entity, and caps on retainage. Any contract for construction of or relating to a facility as defined in KRS Chapter 278 is exempted. Any contract financed under a lien accommodation with Rural Utilities Service (RUS) or entered into by a borrower of funds from RUS is exempted.

3. Senate Bill 76. Amends KRS Chapter 147A to place Kentucky Infrastructure Authority under Governor's Office of Local Development for administrative purposes.

4. Senate Bill 96 – Amends various provisions of KRS Chapter 74 (not enacted).

5. Senate Joint Resolution 109 – Required the Environmental and Public Protection Cabinet to create a Drought Mitigation and Response

Advisory Council and to develop a drought mitigation and response plan to provide for drought mitigation and emergency planning. Council's report must be submitted to the Legislative Research Commission and to the Interim Joint Committee on Agriculture and Natural Resources by December 31, 2008.

F. 2008 General Session

1. House Bill 83 – Amends various provisions of KRS Chapter 74.
2. House Bill 426 – Amends KRS 514.040 to increase the amount that a merchant may charge as a bad check fee to \$50.
3. House Bill 435 – Amends KRS Chapter 65 to require a special district to notify the state local debt officer in writing before entering into any financing obligation, lease, bond issuance, or any long-term debt obligation when the lease price exceeds two hundred thousand dollars (\$200,000).
4. House Bill 506 – Amends KRS Chapter 81 to establish procedures for the annexation of an incorporated area containing utility infrastructure of a city-owned utility by another city and to require the consent of the city that owns the utility infrastructure.
5. General Assembly failed to place in budget bill an exemption from KRS 278.020(1) for certain water district and water association construction projects.

III. Court Decisions

A. Arlinghaus Builders v. Kentucky Public Service Commission, 142 S.W.3d 693 (Ky. App. 2003). A party to a Commission proceeding brought an action for review of Commission Order in which the Commission granted a certificate of public convenience and necessity for the construction of a telecommunications facility. Party filed the complaint within 30 days of the issuance of the Commission Order, but failed to name the proper persons for service of process. It instead named an attorney for Commission Staff and an attorney for applicant. Finding that KRS 278.410 required Plaintiff to properly serve the Commission and the parties to the Commission proceeding for the court to obtain jurisdiction, Franklin Circuit Court dismissed the action for lack of jurisdiction. Reversing the lower court, the Kentucky Court of Appeals found that proper service of summons is necessary for the Court to acquire jurisdiction over an action for review, but Plaintiff had acted in good faith in directing that summons be issued to attorney for Commission Staff and attorney for applicant. Good faith compliance is sufficient for obtaining jurisdiction.

B. City of Greenup v. Public Service Commission, 182 S.W.3d 535 (Ky. App. 2005). Private water utility brought a complaint against a municipal utility in which it alleged a contract between the utility and the city for the wholesale supply of water. The municipal utility denied the existence of a contract and argued that the Commission lacked jurisdiction to determine the existence of a contract. The Commission held that it had the legal authority to determine whether a contract existed and that a contract existed. Kentucky Court of Appeals held that the Public Service Commission has the authority to review the circumstances of contracts between a city and a public utility and determine whether a contract requiring the city to furnish wholesale water service to a public water utility exists, but erred when finding that a contract existed based upon the facts before it.

C. City of Russellville v. Public Service Commission, 2005 WL 385077 (Ky. App. Feb. 18, 2005) (No. 2003-CA-002132-MR). Commission voided a wholesale rate adjustment that a municipal utility had imposed on two public water utility customers 14 months after the adjustment had become effective. Kentucky Court of Appeals found that municipal utility's failure to provide proper notice of the proposed adjustment, including the filing of a tariff sheet setting forth the proposed rate, prevented the proposed rate from becoming effective.

D. Madison v. Commonwealth, 2004 WL 1418359 (Ky. App. June 25, 2004) (No. 2003-CA-001753-MR). An intervening party in a Commission proceeding filed a complaint with Franklin Circuit Court seeking review of a Commission Order in that proceeding, but failed to pay his filing fee and to direct the Circuit Court Clerk to issue and have served a summons on the Commission. Alleging that Complainant had failed to bring his action within 30 days of service of the Order as KRS 278.410 requires, the Commission moved to dismiss the complaint. Franklin Circuit Court granted the motion. On appeal, Kentucky Court of Appeals held that the filing of complaint without directing the issuance and service of a summons is not sufficient to commence an action for review of a Commission Order.

E. Krauser v. Public Service Commission of Kentucky, 2003 WL 21360560 (Ky. App. June 13, 2003) (No. 2001-CA-002006). Party to Commission proceeding brought an action for review of Commission Order, but failed to designate within 10 days of filing his complaint the portions of record necessary to resolve the issues raised in his action. Party subsequently moved Franklin Circuit Court to enlarge the time for the filing of the designation of record. Franklin Circuit Court denied the motion for enlargement of time and dismissed the action for lack of jurisdiction. On appeal, Kentucky Court of Appeals held that timely designation of record is necessary for court to obtain subject matter jurisdiction.

F. Commonwealth v. Public Service Commission, 2008 WL 273923 (Ky. App. Feb. 1, 2008) (No. 2006-CA-001652). Held: KRS 278.030 and KRS 278.170 are

not related. The Commission could not establish a rate classification for certain economic and brownfield development projects that would result in a lower rate for electric service than other rate classifications unless those in that classification were eligible for reduced rate or free service as set forth in KRS 278.170. Kentucky Court of Appeals rejected arguments that KRS 278.170 applies only to reduced rates among customers within the same rate classification.

G. Kentucky Public Service Commission v. Shadoan, ___ S.W.3d ___, 206 WL 2468766 (Ky. App. June 20, 2008) (No. 2007-CA-000697). Held: Plaintiff bringing an action for review of Commission Order must designate record of administrative proceeding within 10 days of filing complaint for Franklin Circuit Court to have jurisdiction over the action. Where action for review is solely based upon a question of law, attaching a copy of the Commission Order to the Complaint is sufficient to meet the substantive requirements of a designation of record. The better practice, however, is to file with the Court a document that designates the portions of the record necessary for the Court to review the Order.

H. Crestbrook Properties, LLC v. Northern Kentucky Water Service District, 2003 WL 21106148 (Ky. App. 2003) (No. 2001-CA-001852-MR). Water district brought against a customer an action in Kenton Circuit Court in which it sought an injunction enjoining the customer from violating the water district's cross-connection control policy and directing the customer to install a cross-connection control device in connection with that policy. Customer argued that the policy violated KRS 278.170 and filed a complaint against the policy with the Commission. Before Commission ruled upon the complaint, Kenton Circuit Court granted water district's motion for summary judgment. Upon appeal, Kentucky Court of Appeals reversed. Court found that: the Commission had exclusive jurisdiction over the question of whether water district's policy violated KRS 278.170; it was manifestly unjust to require the customer to comply with the policy before the Commission had reviewed the reasonableness of the policy; and circuit court's failure to defer to the Commission constituted substantial error.

I. Georgetown Municipal Water and Sewer Service v. Bur-Wal, Inc., 243 S.W.3d 661 (Ky. App. 2007) (No. 2006-CA-000278-MR). Developers brought action against a municipal water utility to recover the costs to install water and sewer lines within the boundaries of a residential subdivision. Developers assert that KRS 96.539 required municipal utility to develop rules for extension of service lines and authorized reimbursement of the cost of installation of such lines. Trial Court found for developers. Reversing lower court, Kentucky Court of Appeals found that developers are not applicants for service or customers and that KRS 96.539 requires refunds only to customers or applicants for service. It further found that KRS 96.539 provides for refunds only where payment for the extension of lines have been made directly to the utility. Court affirmed portion of lower court's decision that directed municipal utility to establish rules for extensions.

J. Louisville/Jefferson County Metro Government v. Richardson, 2006 WL 505050 (Ky. App. Mar. 3, 2006) (No. 2004-CA-002440-MR). Declaratory judgment action brought by a former police officer against Louisville/Jefferson County Metro Government over whether Claims Against Local Government Act required local government to defend officer in civil rights actions brought after the police officer's employment was terminated. Held: Local government is not obligated to defend a suit brought against a former government employee when action is brought after the employee has left employment or been terminated. Claims Against Local Government Act applies only to actions brought against current employees.

K. Public Service Commission v. Commonwealth of Kentucky, --- S.W.3d ---, 2008 WL 4822263, Ky.App., November 07, 2008 (NO. 2007-CA-001635-MR). Court of Appeals reversed Franklin Circuit Court opinion holding that KRS 278.509 violated Kentucky Constitution Section 51 and that the Commission may not authorize a utility to collect a surcharge unless specific statutory authority for the surcharge existed. Held: KRS 278.030 and 278.040 grant Commission plenary ratemaking authority. PSC has the authority to authorize the collection of surcharges not specifically authorized by statute but may not authorize surcharges to recover costs related to capital expenditures that are not beyond the utility's control, fluctuating, unanticipated or threaten the utility's solvency.

L. Commonwealth of Kentucky v. Public Service Commission of Kentucky, Civil Action No. 02-CI-01012 (Franklin Cir. Ct. June 30, 2004). Held: KRS 278.020(5) [now KRS 278.020(6)] does not require the presence of the parent corporation in a Commission proceeding addressing a subsidiary corporation's application to acquire control of a public utility; does not require the acquirer to demonstrate a "quantifiable and immediate benefit" resulting from the proposed acquisition; does not require the Commission to balance the benefits of the utility's shareholders, ratepayers, and the community.

M. Commonwealth v. Kentucky Public Service Commission, Civil Action No. 2006-CI-269 (Franklin Cir. Ct. Aug. 1, 2007). The Commission approved a rate surcharge in a general rate adjustment proceeding to permit a utility recover its costs associated with replacing gas mains. The surcharge was determined based upon a formula and annual Commission proceedings regarding the application of the formula. The Attorney General brought an action for review in which he alleged the surcharge mechanism was unlawful. Held: The Commission may not authorize a surcharge without specific statutory authority. As the proposed surcharge was not specifically authorized by statute, it is unlawful and may not be assessed.

N. The Harbor At Harrods Creek Condominium Association v. Public Service Commission, Civil Action No. 01-CI-01385 (Franklin Cir. Ct. May 27, 2004).

Held: KRS 413.120(2) limits the refund of overbilled amounts to five years from the date a customer files his/her complaint with the Commission.

M. City of Russellville v. Public Service Commission, Civil Action No. 02-CI-01177 (Franklin Cir. Ct. Sep. 11, 2003). Held: The Commission's rejection of a municipal utility's proposed wholesale rate because the city's legislative body had not approved rate is improper. No statute presently requires a city's legislative body to approve a precise rate. While the Commission may adopt such requirement, it must promulgate the requirement by administrative regulation. (The Commission's rejection of rate upheld on other grounds.)

IV. Attorney General Opinions

A. Nature of Attorney General Opinions

1. KRS 15.020: The Attorney General is "the chief law officer of the Commonwealth of Kentucky and all of its departments, commissions, agencies, and political subdivisions, and the legal adviser of all state officers, departments, commissions, and agencies, and when requested in writing shall furnish to them his written opinion touching any of their official duties . . ."

2. See York v. Commonwealth, App., 815 S.W.2d 415, 417 (Ky. App. 1991) ("An attorney general's opinion is highly persuasive, but not binding on the recipient.").

B. OAG 2002-1 (Feb. 7, 2002)

1. Issue: What is the ability of fiscal courts to regulate utilities?

2. Fiscal courts have the authority to regulate utilities in so far as they entered on and potentially conflict with public rights-of-way controlled by the county.

3. KRS 67.083 provides that fiscal courts may enact ordinances and issue regulations regarding the "[p]rovision of water and sewage and garbage disposal service, but not gas or electricity." AG concludes "it is clear that fiscal courts may generally regulate water, sewer and cable television services in the county, but are restricted from governing the use of gas or electricity. . . . [T]his type of regulation by fiscal courts often involves a utility's use of county right-of-way and public access."

4. Unclear how far fiscal court's jurisdiction extends to public utilities or if it applies to municipal utilities. AG recognizes that the Commission has "main regulatory jurisdiction" over utilities other than municipal utilities.

C. OAG 03-OMD-116

1. While present at a water district board of commissioners' monthly meeting, an attendee was requested to provide his name for an attendance roster. The board subsequently made the roster part of the minutes of the meeting. The attendee objected in writing to the practice. The water district did not respond to the attendee's objections. The attendee then complained to the Attorney General. Water district denied that signing the attendance roster is a condition for attending the meeting.

2. Held: No person may be required to identify himself to attend a meeting of a public agency. Based upon evidence, water district found not to have required attendee to do so. Open Meetings Act does not prohibit a public agency from identifying in the minutes of its meetings those who attended the meeting.

D. OAG 04-ORD-026

1. Request made to County Judge/Executive regarding certain water district bond issuances. County Judge/Executive responded to request within required time period, but failed to advise immediately that requested documents were in possession of water district. Twenty days after initial response, County Judge/Executive advised requester to contact water district. Upon receiving request for documents, water district advised that it would make all documents within its possession available for inspection, but was under no affirmative duty to honor a request for information. Requester inspected available records, but portions of the information sought were not available.

2. Held: County Judge/Executive failed to comply with Open Records Act by failing to make timely referral of original request. Water district's actions complied with Open Records Act. Requester's request was not framed as a request for reasonably described public records, but instead as a request for information to be extracted from reasonably described public records. A public agency is not obligated to honor a request for information as opposed to a request for specifically described records. Water district, however, appears to have improperly maintained its records.

E. OAG 08-ORD-139

1. Group requested records from a water association relating to the construction of a water pipeline through Shelby County, Kentucky. Water association did not answer request. Upon complaint to Attorney General, water association asserted that it was not a public agency and not subject to the Open Records Act. Water association had received a \$1.5 million

grant from the Commonwealth for the construction of a 12-inch water transmission line. Water association provided a copy of all documents related to grant.

2. Held: A water association organized under KRS Chapter 273 as a nonprofit corporation is not a political subdivision, agent of a political subdivision, or special district. It is not generally subject to the Open Records Act or Open Meetings Act. Such corporations are public agencies for purposes of the *Open Records Act* only if they derive at least 25 percent of their funds from state or local authority. Requester is entitled to inspect all records related to functions, activities, programs, or operations funded by the state grant, but is not entitled to inspect the water association's remaining records inasmuch as those records are not public records for open records purposes.

F. OAG 08-ORD-147

1. Person requested copies of certain documents from water district. Requester resides in the county in which water district is located. Water district failed to respond to request within 3 days. After requester filed a complaint with Attorney General, the water district responded contending that the request was overly broad and burdensome, requested a more specific request for documents, and required that requester first inspect the records.

2. Held: Water district is subject to Open Records Act. It must respond to request for documents within 3 business days of receipt of request. Procedural requirements of the Open Records Act are not mere formalities, but are an essential part of the prompt and orderly processing of an Open Records Act request. Where the requester resides or has its principal place of business in the county where the public records are located, the public agency may require the requester to inspect the requested documents at its offices before providing copies. Inspection is not required where the requestor resides or has its principal place of business outside of the county where the public records are located. Where request for records is made by mail, the requester must precisely describe the records that it is seeking. When a precise description is not provided, the public agency meets the requirements of the Open Records Act by making the documents available for inspection.

V. Public Service Commission Decisions (2007 – Present)

A. Automatic Adjustment Mechanisms

1. Case No. 2006-00072, City of North Middletown (Ky. PSC Jan. 12, 2007). Commission found that municipal utility violated Commission's

Order of August 1, 1994 in Administrative Case No. 351 and KRS 278.160 by failing to file with the Commission its contract to supply water to a water association. Commission further found that municipal utility violated KRS 278.180 by failing to provide Commission with notice of rate adjustment before adjusting its wholesale rate. The Commission rejected contention that purchased water adjustment provision in wholesale contract that permitted municipal utility to adjust its rates to reflect an increase in a supplier's rates relieved the municipal utility of its obligation to notify the Commission of the proposed adjustment. The Commission did not find the contract as containing a precise rate-making formula or an automatic mechanism for passing through increases in a supplier's rates for purchased water. The Commission further noted that if contract had contained such a precise formula, no violation of KRS 278.180 would have occurred.

2. Case No. 2007-00299, Bath County Water District (Ky. PSC Sep. 26, 2007). Held that a recalculation of rate schedule required by an automatic adjustment mechanism in a wholesale water contract did not constitute an adjustment in rates as defined in KRS 278.180. "[A]s the formula set forth in the contract between Morehead and Bath District is the rate for wholesale water service and as this formula has remained unchanged since the contract's execution, KRS 278.180(1) did not require 30 days' notice to the Commission of the recalculated cost components."

B. Water Distribution Main Extension Policies: Real Estate Subdivisions

1. Case No. 2006-00118, South Anderson Water District (Ky. PSC Aug. 16, 2007). The Commission authorized a deviation from Administrative Regulation 807 KAR 5:066, Section 11(3), to permit a water district to limit the amount of refunds in a calendar year to real estate subdivision developers for connections made to a water main extension to a real estate subdivision. The Commission-approved deviation potentially lengthened the time period that a real estate subdivision must wait before receiving refund, but required all refunds within 10-year period. The Order contains an extended analysis of Section 11(3) and effectively rejected the Commission's conclusions in Administrative Case No. 386 regarding Section 11(3).

2. Case No. 2006-00542, West McCracken Water District (Ky. PSC June 22, 2007). Commission approved water district's proposal to require real estate subdivision developers to deposit 5 percent of total water main extension costs to cover the cost of re-grading and re-landscaping on and around water main extension. Deposit was to be refunded after one year.

C. Transfer of Control of Utility

1. Case No. 2006-00197, Kentucky-American Water Company (Ky. PSC April 16, 2007). Investor-owned water utility sought approval for initial public offering (IPO) of stock. The Commission found that IPO did not constitute an acquisition of control as within KRS 278.020(6), but did constitute a transfer of control within KRS 278.020(5). The Commission further found that KRS 278.020(5) required the Commission to determine if the proposed transfer of control was “consistent with the public interest” and empowered the Commission to impose conditions on the proposed transfer of control to “ensure that it will not adversely affect utility service.” The Commission further held that when reviewing an IPO where the identity of the acquiring parties cannot be discerned before the IPO “an accurate assessment of the acquiring parties’ ability to provide utility service can be made through an examination of the abilities of the management that is currently in place and will remain in place after the transaction is completed.”

2. Case No. 2007-00488, Auxier Water Co. (Ky. PSC Mar. 14, 2008). Investor-owned water utility and municipal utility jointly applied for Commission approval of municipal utility’s acquisition of the water utility. The Commission granted the application, but imposed conditions upon the transfer to include refund of the water utility’s customer deposits and limiting the rate that the municipal utility could impose upon the former customers of the water utility.

3. Case No. 2008-00074, Hardin County Water District No. 1. Water district applied to the Commission for approval of acquisition of municipal sewer system, authority to assume the municipal utility’s debt, and authority to continue charging the municipal utility’s existing rate. Finding that a municipal utility is not a utility for purposes of KRS 278.020(5) and (6), the Commission held that Commission approval of the transfer was not required. The Commission held that a public utility should generally assess the same rates to the customers of the acquired non-jurisdictional municipal utility as those assessed to its existing customers, but that the public utility’s filed rates are presumed to be reasonable as a matter of law. Finding that extenuating circumstances existed, the Commission authorized the water district to continuing assessing the rates that the municipal utility had assessed for sewer services.

D. Surcharges: Case No. 2006-00315, Northern Kentucky Water District (Ky. PSC Dec. 26, 2007) The Commission approved water district’s application for a surcharge to finance water main extension in a new “subdistrict.” Subdistrict was not geographically based, but defined by customer density among remaining unserved areas in county. Held: “Where a subdistrict is created for rate-making purposes, the areas placed within that subdistrict should have some common

characteristic or interest. The proponent of the subdistrict's creation bears the burden of demonstrating the reasonableness of the subdistrict's boundaries. At a minimum, it should demonstrate that the subdistrict's territories are served by common utility plant and facilities or share common geographic characteristics. Absent such demonstration, any rate that is based solely on a customer's location within the subdistrict's territory may be deemed unreasonable. Areas within proposed subdistrict had a common characteristic – high customer density. The use of customer density as the distinguishing factor to develop a rate to recover the cost of water main extensions to unserved areas may be reasonable depending upon the circumstances of the extension.”

E. Late Payment Fees

1. Case No. 2006-00365, Kentucky Dam Village State Park v. North Marshall Water District (Ky. PSC July 31, 2007). State park brought complaint against water district in which it alleged that water district had unlawfully assessed a late fee. The Commission rejected state park's contention that KRS 45.453 and KRS 45.454 limited the late payment fees that a utility could impose on a state agency and held that KRS 278.160 requires that a utility must apply the terms of its filed rate schedules to state government agencies in the same manner as it would to all other customers.

2. Case No. 2008-00047, Barkley Lake Water District (Ky. PSC June 30, 2008). Water district sought declaratory ruling regarding the assessment of a late penalty fee for payments that were received but misplaced by U.S. Postal Service. The Commission held that water district had received payments when delivered to its post office box, even if Postal Service subsequently misplaced the mail, and that late payment fee could not be assessed.

F. Commission Failure to Rule on Municipal Wholesale Rate within 10 Months: Case No. 2006-00403, City of Falmouth, Kentucky (Ky. PSC June 27, 2007). The Commission failed to enter a final decision upon the reasonableness of municipal utility's proposed increase to its wholesale water service rate within 10 months of its notice to Commission. Held: When a city contracts with a public utility to provide utility service, it loses its exemption from Commission jurisdiction and becomes a public utility subject to the provisions of KRS Chapter 278. KRS 278.180(1) provides that a utility may not change any rate without 30 days' notice to the Commission. KRS 278.190(1) authorizes the Commission to hold a hearing on and otherwise investigate the reasonableness of a proposed rate. KRS 278.190(3) requires that the Commission complete its investigation and render a final decision within 10 months of the filing of the proposed rate. The Commission's failure to render a decision within this period will result in the proposed rates becoming effective.

G. Commission Failure to Suspend on Proposed Rate Adjustment: Case No. 2007-00199, South Shore Water Works (Ky. PSC Mar. 24, 2008). Water utility applied for adjustment of water rates and included a rate schedule that provided for the proposed rates to become effective within 30 days of its filing. Commission failed to suspend the proposed rates within 30 days of filing. Held: As a result of the Commission's failure to suspend the proposed rates, the rates became effective by operation of law on the 31st day.

H. Removal of Water District Commissioner: Case No. 2007-00373, Joe Conley v. Maggofin County Water District (Ky. PSC Mar. 24, 2008). The Commission investigated allegations that a water district commissioner was not eligible to serve because he was not a resident of the water district. The Commission dismissed the complaint after determining that the water district commissioner resided within the water district's boundaries.

I. Water District Commissioner Training

1. Case No. 2007-00387, Northern Kentucky Water District (Ky. PSC Feb. 28, 2008). Water district applied for accreditation of "in-house" water management training programs. While noting several significant concerns with such programs, the Commission found that these concerns "do not serve as an adequate basis for denying accreditation." The Commission further found that, "to ensure compliance with the letter and spirit of 807 KAR 5:070, any water district seeking accreditation for an in-house course of instruction should apply for such accreditation at least 30 days prior to the performance of that instruction."

2. Case No. 2008-00191, Northern Kentucky Water District (Ky. PSC Nov. 7, 2008). Water district applied for accreditation of "in-house" water management training programs. The Commission decline to accredit portions of the training program because training was designed less to provide general training or information related to water system management or operation than to provide status report on the utility's operations.

J. Fire Protection Service: Case No. 2007-00450, Kentucky-American Water Company (Ky. PSC Feb 28, 2008). Water utility petitioned for authority to discontinue fire protection service customers for non-payment. Finding that Administrative Regulation 807 KAR 5:006, Section 14, authorizes a utility to discontinue service for non-payment without specific Commission authorization, the Commission denied the petition as moot. The Commission further found that the water utility's efforts to notify these customers' insurers and local fire departments of its intent to discontinue service were prudent and reasonable and should be considered as the better practice for all water utilities that intend to discontinue a customer's fire protection service for nonpayment.

K. Connection Fees: Case No. 2006-00497, Wood Creek Water District (Ky. PSC June 1, 2007). The Commission approved a water district's application for a reduction of connection fee for certain wastewater collection main extensions to encourage connections and directed connection fee to terminate upon completion of the collection main.

L. Need for Attorney: Case No. 2003-00312, Fountain Run Water District No. 1 (Ky. PSC Oct. 17, 2007) – Application must be signed by lawyer. Rejected application of water district for an extension of time to comply with water storage requirements set forth in 807 KAR 5:066, Section 4(4), that was submitted by a water district's engineer. Held: An attorney must submit the application for water district.

M. Certificate of Public Convenience and Necessity

1. Case No. 2007-00014, Big Sandy Water District (Ky. PSC April 3, 2007). Water district applied for a certificate of public convenience and necessity to acquire and install radio read meters. The Commission held that “[l]arge scale replacement of existing metering systems with automated meter reading equipment constitutes an extension of service that may require a certificate of public convenience and necessity.

2. Case No. 2008-00119, Northern Kentucky Water District (Ky. PSC July 29, 2008). The Commission granted water district's application for a certificate of public convenience and necessity for the installation of radio read meters system-wide.

3. Case No. 2007-00202, Carroll County Water District No. 1 v. Gallatin County Water District, (Ky. PSC Sept. 15, 2008). Certificate of public convenience and necessity is required to construct facilities other than those in the ordinary course of business. KRS 278.020(1). 807 KAR 5:001, Section 9(3), provides: “No certificate of public convenience and necessity will be required for extensions that **do not** create wasteful duplication of plant, equipment, property or facilities, or **conflict with the existing certificates or service of other utilities operating in the same area and under the jurisdiction of the commission that are in the general area in which the utility renders service or contiguous thereto**, and that do not involve sufficient capital outlay to materially affect the existing financial condition of the utility involved, or will not result in increased charges to its customers.” A water district's construction of facilities in the territory of another water district is not an extension in the ordinary course and requires a certificate of public convenience and necessity.

N. PSC Appointment of Water District Commissioners

1. Case No. 2007-00036, Lyon County Water District (Ky. PSC Aug. 29, 2007). County Judge/Executive petitioned Commission to appoint his nominee to water district's board of commissioners. Finding that "reappointment of an experienced, proven commissioner constitutes the most reasonable and expeditious resolution to the current impasse," the Commission denied petition and instead reappointed current officeholder.

2. Case No. 2007-00200, Lyon County Water District (Ky. PSC Aug. 29, 2007). County Judge/Executive petitioned Commission to appoint his nominee to water district's board of commissioners. Finding that "reappointment of an experienced, proven commissioner constitutes the most reasonable and expeditious resolution to the current impasse," the Commission denied petition and instead reappointed current officeholder.

3. Case No. 2007-00493, Breathitt County Water District (Ky. PSC Mar. 20, 2008). Members of Fiscal Court requested the PSC to appoint their nominees after Fiscal Court rejected County Judge/Executive's nominees. County Judge/Executive subsequently applied for appointment of his nominees. While application was pending before the Commission, County Judge/Executive and Fiscal Court reached agreement upon appointment and submitted agreement to PSC for action. Appointing the nominees upon whom the County Judge/Executive and Fiscal Court had agreed, the Commission noted that while a county judge/executive and a county fiscal court may reach agreement on the vacant position, they lack authority to fill the vacancy once it has remained unfilled for more than 90 days. Any action on their part to appoint and approve a candidate at that time has limited legal effect and constitutes only a recommendation to the Commission. While noting that it has exclusive authority to fill vacancies that exist for 90 days or more, the Commission stated that it will defer to the local elected officials in those instances where the local appointing and approval authorities have reached agreement on a candidate. Absent unusual circumstances that raise clear concerns about an agreed candidate's qualifications, such deference is appropriate because local officials generally have a better understanding of the candidates' qualifications and of the water district's needs and because these officials are directly accountable to the water district's customers through the ballot box.

O. Credit or Debit Card Use Fee: Case No. 2008-00171, Caldwell County Water District (Ky. PSC June 18, 2008). The Commission approved a fee for debit or credit card use based upon the actual cost of use to the water district.

P. Returned Check Fee: Case No. 2007-00194, South 641 Water District (Ky. PSC June 28, 2007). Held that, absent extraordinary circumstances, KRS 514.040 limits the amount that a utility may charge for passing a bad check.

Q. Free Water to Water District Commissioners: Case No. 2007-00211, West Shelby Water District (Ky. Aug. 29, 2007). Water district requested approval to provide free water service to its commissioners. Denying application, the Commission held that requiring ratepayers to absorb the cost of free water service is unreasonable and that free service would circumvent restrictions on water district commissioner's salary.

R. Rural Development Financing

1. Case No. 2007-00245, Martin County Water District (Ky. PSC July 16, 2007). When approving a water district's plan of financing of a water system improvements project that Rural Development (RD) financed, the Commission recommended that RD impose some or all of the improvements that a Commission management audit recommended as a condition to lending.

2. Case No. 2007-00385, Rowan Water Inc. (Ky. PSC Oct. 12, 2007). When approving a water district's plan of financing of a water system improvements project that RD financed, the Commission recommended that RD should refrain from including any rates and charges that are unrelated to proposed construction projects in its letters of conditions, especially those charges that involve customer deposits and non-recurring charges. The Commission stated that water utilities seeking review of such charges should follow the procedures set forth in Administrative Regulation 807 KAR 5:011 and that Commission review of these charges have historically been prompt and have not involved expensive or lengthy proceedings.

3. Case No. 2008-00045, U.S. 60 Water District (Ky. PSC Mar. 7, 2008). When approving a water district's plan of financing a water system improvements project that RD financed, the Commission recommended that RD should refrain from including any rates and charges that are unrelated to proposed construction projects in its letters of conditions. The RD Letter of Conditions required a fire hydrant fee of \$5 per month despite the water district's tariff containing provisions that disclaim any ability to provide fire protection service.

4. Case No. 2008-00052, Mountain Water District (Ky. PSC Mar. 12, 2008). Water district applied for approval of a rate adjustment, issuance of a certificate of public convenience and necessity, and authority to issue evidence of indebtedness as part its plan of financing for a water system improvements project involving RD financing. RD required adjustments to

the utility's Line Leak Adjustment Rate. While approving the application, the Commission expressed its concern regarding the use of RD funding to subvert and circumvent the Commission's authority over a water utility's rates and recommended that RD refrain from conditioning its loans and grants upon adjustments to non-recurring rates that are unrelated to the financing of a waterworks improvement project.

S. Failure to Comply With Rate Schedule: Case No. 2007-00275, North Marshall Water District (Ky. PSC Dec. 5, 2007). The Commission assessed a penalty against a water district that failed to follow the provisions of its filed rate schedule that specified when utility bills are to be issued.

T. Purchased Water Adjustments

1. Case No. 2007-00316, East Casey County Water District (Ky. PSC Aug. 29, 2007). Water district applied for purchased water adjustment to pass through increase in the wholesale rate of its municipal supplier. Denying the application, the Commission found that the municipal supplier had not provided the Commission with the notice of any rate change that KRS 278.180 requires. The municipal supplier's rate adjustment was therefore not effective or lawful, could not be assessed, and could not serve as the basis for a purchased water adjustment.

2. Case No. 2008-00109, Garrard County Water Association (Ky. PSC May 15, 2008). Water district applied for purchased water adjustment to pass through increase in the wholesale rate of its municipal suppliers. Denying the application in part, the Commission found that one of the municipal suppliers had not provided the Commission with the notice of any rate change as KRS 278.180 requires. That municipal supplier's rate adjustment was therefore not effective or lawful, could not be assessed, and could not serve as the basis for a purchased water adjustment.

U. Free or Reduced Rate Service

1. Case No. 2007-00447, Knox County Utility District (Ky. PSC Dec. 20, 2007). The Commission authorized water district to waive its water connection fee to allow county government to establish an emergency source for county residents whose wells had run dry.

2. Case No. 2007-00481, Overland Development (Ky. PSC May 1, 2008). Water utility applied for authority to provide free water service to its employees and reduced rates for water leaks and swimming pool usage. PSC authorized free water service to employees. Finding that the utility had failed to present any arguments in support of the reduced rate for swimming pool usage and to place reasonable restrictions on its proposed

leak adjustment proposal to prevent possible abuse, the Commission denied those aspects of the water utility's application.

V. Service Line Connections: Case No. 2005-00148, Northern Kentucky Water District (Ky. PSC July 18, 2008). Water district requested a deviation from 807 KAR 5:066, Section 12(1)(a), which places responsibility upon water utility for maintenance and ownership of service line connection from distribution main to metering point, for all connections in which meter is located inside a building. Commission held that present regulation did not apply to service line connections made prior to June 7, 1992. Utility's responsibility for service line connections installed prior to June 7, 1992 extended only to the curb box, or to the curb stop if no curb box was installed. The Commission further did not extend the requirements of Section 12 to service line connections that the water utility purchased from a water system that was not subject to Commission jurisdiction at the time the service connection was installed.

W. Water District Commissioner Misconduct: Case No. 2006-00465, Southern Madison Water District (Ky. PSC Feb. 15, 2008). Commission investigated transactions between a water district and a member of its board of commissioners. While finding that a contract between the commissioner and the water district for the commissioner to provide inspection services to the water district represented a conflict of interest, the circumstances did not warrant removal of the commissioner. Commission stated that the better practice for all water district commissioners was to avoid any business dealings with their water districts. Commission further recommended that when a water district commissioner seeks to abstain from voting upon an issue, he should absent himself from the entire meeting or from the discussion and the vote upon which the potential conflict exists. Commission cautioned all water districts to the need to "prepare more accurate and complete minutes of their meetings to ensure a full and detailed record and to avoid unnecessary litigation or regulatory review."

X. Service to Mobile Home Parks: Case No. 2007-00461, Hardin County Water District No. 1 (Ky. PSC Aug. 14, 2008). Water district proposed revisions to its rules to place responsibility for water service to mobile home parks on the mobile park owner. Proposed revisions would transfer responsibility from the water district for providing water service and billing such service to the end-user. Finding certain provisions of proposed rule as unreasonable, including the procedures for transferring responsibility for service to the mobile home park owner, the Commission denied the proposed revision.

Y. Water District Merger: Case No. 2007-00496, Merger of Graves County Water Districts (Ky. PSC May 21, 2008). The Commission approved the application of four water districts in Graves County, Kentucky to merge their districts. The Commission noted that KRS 278.020(6) is not applicable to water district mergers.

VI. Public Service Commission – Cases To Watch

A. Appointment of Water District Commissioners: Case No. 2008-003953, Letcher County Water and Sewer District.

B. Automatic Adjustment Mechanism: Case No. 2008-00176, City of Danville, Kentucky.

C. Free Water Service to Water District Commissioners/Employees: Case No. 2008-00220, Cannonsburg Water District.

D. Adequacy of Municipal Utility's Supply: Case No. Case No. 2008-00443. Magoffin County Water District.

VII. Public Service Commission – Other Changes

A. Personnel Changes

1. Resignation of Commissioner Mark David Goss/Appointment of Commissioner David L. Armstrong (Chairman)

2. Resignation of Commissioner Caroline P. Clark/Appointment of Commissioner James W. Gardner (Vice Chairman)

3. Appointment of Stephanie Stumbo as Executive Director

4. Appointment of David Samford as Deputy Executive Director

5. Appointment of New Division Directors

a. Wayne Miller – Financial Analysis Division

b. Reggie Chaney – Engineering Division

c. Ryan Gatewood – Filings Division

B. Administrative Regulation Review. The Commission is currently reviewing its administrative regulations related to the provision of water service. These include: 807 KAR 5:066; 807 KAR 5:067; 807 KAR 5:068; 807 KAR 5:069; 807 KAR 5:070; and 807 KAR 5:090.

C. Electronic Initiatives

1. Electronic Working Group on Web-Site/Electronic Filing

2. Emphasis on Electronic Filing

3. Distance Learning Opportunities

D. Municipal Utility Toolbox